UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

OLIN CORPORATION,	:	
Plaintiff,	:	
v.	:	Civil Action No. 93-11166-WF
FISONS PLC, NOR-AM CHEMICAL COMPANY, AMERICAN BILTRITE INC., THE BILTRITE CORPORATION and JOHN DOES,	:	
Defendants.	:	

REPLY TO OLIN CORPORATION'S AND NOR-AM CHEMICAL COMPANY'S OPPOSITION TO FISONS PLC'S MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION

Defendant Fisons plc ("Fisons") respectfully submits this reply memorandum in further support of its motion to dismiss for lack of personal jurisdiction.

INTRODUCTION

Plaintiff Olin Corporation ("Olin") postulates that personal jurisdiction can be asserted over Fisons based on either Fisons' direct contacts with Massachusetts or a veil-piercing theory which attributes to Fisons the activities of its subsidiaries (Olin's Br. at 2).[1] However, its accumulation of asserted facts does not make a prima facie case for personal jurisdiction under either theory. Neither Olin nor defendant/cross-claimant NOR-AM Chemical Company ("NOR-AM"), which has also

1 "Olin's Br." refers to Olin's Opposition to Fisons plc's Motion to Dismiss For Lack of Personal Jurisdiction dated September 13, 1993.

opposed this motion, provide any competent evidence that Fisons has sufficient systematic and continuous contacts with the forum to be held generally amenable to suit in Massachusetts. Despite conceding that its claims must "directly arise out of, or relate to, [Fisons'] forum activities" (Olin's Br. at 16), Olin devotes the majority of its opposition brief pointing to alleged contacts between Fisons plc and this forum which have no relation whatsoever to Olin's environmental claims and which, in any event, are based not upon any competent evidence, but upon rank speculation and "belief".

THE FACTS

Notwithstanding the speculation of NOR-AM's Counsel (see Rader Decl. at ¶ 4)[2], Fisons is not generally amenable to suit in the Commonwealth of Massachusetts. Neither Fisons nor any division of Fisons conducts any business in Massachusetts (Supplemental Declaration of John M. Bailey ¶ 2). Neither Fisons nor any of its divisions engages in any sales activity in the Commonwealth of Massachusetts or anywhere else in the American market (id.). Fisons is a British holding company (id.). It sells no products whatsoever in North America (id.). All business done in North America is done, not by Fisons, but by separate, independant subsidiaries in their own names for their own accounts (id.).

Two relevant facts are exceedingly clear from the papers submitted by the parties to this point. The first is that there is not one shard of evidence or even

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2 "Rader Decl." refers to the information and belief Declaration of attorney Kermit L. Rader dated September 13, 1993.

averment based on belief that Fisons had anything to do with the day-to-day activities of National Polychemicals Incorporated ("NPI").[3] Olin alleges no facts that indicate anything beyond a normal parent-subsidiary relationship between Fisons and NPI.

The second is that Fisons had nothing to do with the waste disposal practices of NPI. Olin presents only one allegation that even mentions Fisons and waste disposal in the same paragraph. Olin claims that during "the Fisons plc years" new warehouses were constructed that resulted in the closure of two waste disposal pits on the property thus necessitating the construction of two new pits in a different area of the property (Olin's Br. at 8-9). With this scant foundation, Olin attempts to build its case not through evidence but through speculation and innuendo. Based on the attached Declaration of Charles Riley (Exhibit 20 to Olin's Br.), Olin "understands that Fisons plc authorized the funding for these construction projects, including the disposal facilities" (Olin's Br. at 9) (emphasis added). Riley states that he "believes" that Fisons Ltd. approved funding of these new facilities (Riley Declaration ¶ 4).[4] Even if Riley's unsupported belief were true, it does not

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3 Olin attempts to create a distinction between National Polychemicals, Inc. prior and subsequent to Fisons indirect purchase of its stock by giving the company two different names -- NPI and NPI II. This distinction is an exercise in sleight of word. NPI and NPI-II (using Olin's formulation) are the same company. After the purchase, NPI continued to exist as a distinct corporation maintaining the same officers, employees, production facilities and basically operating in the same manner as it had before the purchase. Olin does not, and cannot dispute this.

4 Affidavit statements based on mere belief are not proof of jurisdictional facts and must be stricken. (See Fisons' Motion to Strike the Declarations of Kermit L. Rader and Charles Riley filed herewith.)

mean that Fisons made the decision to build the warehouses or move the pits. Such decisions were made by NPI employees at the Wilmington facility. (See Fisons' Memorandum of Law in Support of its Motion to Dismiss at 4.) Furthermore, in an earlier litigation Riley testified at deposition that he could not remember ever discussing NPI waste disposal practices with any officer or director of Fisons Corporation or Fisons Ltd. or receiving any instructions from any officer or director of Fisons Corporation or Fisons Ltd. relating to the Plant's waste disposal practices. (Riley Deposition Transcript at 2-125).[5]

Lacking proof that Fisons ran NPI or managed its waste disposal practices, Olin alleges a litany of contacts between Fisons and the forum in anticipation that their cumulative weight will lead the Court to find jurisdiction over Fisons.[6] However, Olin never explains what any of these contacts have to do with the alleged cause of action, nor does it refute Fisons' evidence that NPI was run by its own management as a completely independent subsidiary.

Olin spends three pages in its Opposition Brief reciting contacts Fisons had with Massachusetts in negotiating and purchasing NPI in the early 1960s (Olin's

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5 When attempting to create a material issue of fact, a party's post-motion affidavit which contradicts his own prior deposition testimony should be disregarded. Mack v. United States, 814 F.2d 120, 124 (2d Cir. 1987); Radobenko v. Automated Equipment Corp., 520 F.2d 540, 544 (9th Cir. 1975); Perma Research and Development Co. v. Singer Co., 410 F.2d 572, 577-78 (2d Cir. 1969); Lowery v. Airco, Inc., 725 F. Supp. 82, 85-86 (D. Mass. 1989)(Young, J.).

6 Notably, these allegations come in Olin's brief, not its complaint or in any affidavit or proper evidentiary form.

Br. at 3-6).[7] None of these asserted facts relate to Olin's cause of action involving environmental contamination and thus have no bearing on whether or not the Court can exercise long-arm jurisdiction over Fisons.

Next, Olin points to the employment contract signed by Edward Osberg, who served as President of NPI. Olin ignores that Osberg ran NPI when it was owned by American Biltrite and continued to run it after Fisons sold NPI (Supplementary Declaration of Arthur Stuart Woodhams ¶ 5). Olin also ignores that Osberg's contract with Fisons was almost immediately assigned to NPI (id.). Thus, he was not a Fisons employee during the time of the alleged waste disposal activities. Rather, he was employed by and ran NPI independently from the parent corporation (id.).

Olin cites to various individuals who were allegedly "assigned" to work for NPI, implying that they were simultaneously under Fisons' control (Olin's Br. at 6-7). That implication is false. Anthony Greene did in fact come over to NPI from Whiffen & Sons and Fisons. However, when he did so, he became an NPI employee (Riley Tr. 2-162) and ceased being a Fisons employee (Woodhams Supp. Decl. ¶ 6). Indeed, he remained at NPI well after Fisons sold its interest in the company (id.). As for the other individuals referenced by Olin (Olin's Br. at 6-7), none of them worked for Fisons. Christopher Cronin was an employee of Fisons Corp., an independent subsidiary of Fisons and predecessor company to NOR-AM. Dr. Dixon was a

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7 Fisons itself did not even actually purchase NPI; it established a subsidiary, Whiffens, Inc., for that purpose.

consultant to Fisons Corp. (not Fisons Ltd.) -- the assertion that his "recommendations" were implemented at the Plant is nowhere supported by the Minutes of the Board of Directors of Fisons Corp. cited by Olin. (See Exhibit 13 to Olin's Br. at 6-7). Jon Slaven was likewise an employee of Fisons Corp., not Fisons or NPI. The activities of these individuals do not demonstrate any peculiar control exercised by Fisons over NPI. Furthermore, none of the individuals cited by Olin had anything to do with waste management at the Facility nor were they otherwise connected to Olin's environmental claims (Olin's Br. at 6-7).

Olin cryptically asserts that when Fisons created Fisons Corp. it "completely controlled" its By-Laws. Besides not being certain what this means, Fisons is at a loss to explain the significance of this allegation to the issue of personal jurisdiction. Olin then lists the Fisons "representatives" who appeared on the NPI board of directors. However, Olin does not dispute that no Fisons officer or director was ever made an officer of NPI (Woodhams Supp. Decl. ¶ 3). Likewise, Olin cannot show that Fisons "representatives" ever constituted a majority of the NPI board (id.). Thus, Fisons' representation on the NPI board hardly bends the notion of a normal parent-subsidiary relationship.

Olin argues that Fisons placed "stringent capital controls" on NPI and cited approval of a "forklift truck that cost only $6,685."[8] These large capital expenditures for specific items were given approval as part of overall budgets

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8 "Only $6,685" is a misleading characterization. $6,685 is in 1964, not 1993 dollars.

(Woodhams Supp. Decl. ¶ 4). Olin's own document identifies the proposal as one item on a list for the fiscal year. NPI personnel and officers would decide what items needed to be purchased and to what use they would be put (id.). Such routine approval of very large expenditures is a common practice between parents and their wholly-owned subsidiaries as a method of protecting a substantial investment. It hardly indicates domination and control that would warrant piercing the corporate veil to assert jurisdiction.

Finally, Olin tries to prove jurisdiction over Fisons by alleging that it used the Wilmington site for the separate operations of Patco Products, Inc. ("Patco") and approved funding for a fertilizer facility at the site. It offers no proof of this assertion and thus it has no bearing as a jurisdictional fact. The evidence cited regarding Patco, the Fisons Corp. board minutes (Exhibit 17 attached to Olin's Br.) makes no mention of Fisons' approving expenditures of Patco. Olin makes no prima facie case that Patco was anything other than an independently operated subsidiary of Fisons and Fisons Corp. when it occupied space at the Wilmington site and nowhere connects Fisons to any alleged waste disposal by Patco.[9]

The upshot of all these asserted contacts and control mechanisms is that Fisons behaved towards NPI in a manner that any parent corporation would in order to protect a substantial investment of capital. Fisons did not interfere in the

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9 In fact, Charles Riley testified that he was unaware of any waste disposal practices engaged in by Patco other than putting their trash in a dumpster (Riley Tr. 2-127).

running of the business in a way that would justify piercing the corporate veil for jurisdictional purposes. See Motion to Dismiss at 13-17.

I.
OLIN AND NOR-AM HAVE FAILED TO PROVE SUFFICIENT JURISDICTIONAL FACTS TO DEFEAT FISONS' MOTION TO DISMISS

A. Olin Has Failed to Establish General Jurisdiction Over Fisons

Olin argues that the Court need not find that Fisons exercised excessive control over NPI to assert jurisdiction under the Massachusetts long-arm statute and the Due Process Clause because Fisons has sufficient direct contacts with the forum (Olin's Br. at 10-12). Olin never quite figures out under which theory these contacts are supposed to supply the Court with personal jurisdiction over Fisons. If Olin is claiming that these contacts in the aggregate allow the Court to exercise general jurisdiction over Fisons, that claim clearly fails. Fisons does not currently do any business or maintain any presence in Massachusetts (see Bailey Supp. Decl. ¶ 2).[10] For general jurisdiction, the defendant has to have continuous and systematic

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10 NOR-AM suggests, upon information and belief, that American Depositary Receipts ("ADRs") of Fisons plc are traded in Massachusetts and that that is sufficient contact for the court to assert jurisdiction over Fisons (NOR-AM Opposition Brief at 4-5). NOR-AM presents no actual evidence that Fisons ADRs are traded in Massachusetts. Even if Fisons ADRs are traded in the forum, such activity does not confer personal jurisdiction on Fisons. See Sears, Roebuck & Co. v. Sears plc, 744 F. Supp. 1297, 1302 (D. Del. 1990)(trading of ADRs in forum does not subject defendants to Delaware long-arm statute); Consolidated Gold Field, PLC v. Anglo-American Corporation of South Africa, 698 F. Supp. 487, 494 (S.D.N.Y. 1988)(trading of

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contacts with the forum **at the time that the complaint is filed.** See Mylan Laboratories, Inc. v. Akzo, N.V., 1993 WL 293509 at *3, ___ F.3d ___, ___ (4th Cir. 1993) (upholding dismissal for lack of personal jurisdiction because "Mylan made no attempt to show that Akzo possessed direct contacts with Maryland at the time this action commenced"); St. Paul Surplus Lines Insurance Co. v. Cannelton Industries, Inc., 1993 WL 249117 at *3 (W.D. Mich. July 1, 1993) (evidence that defendant and subsidiaries carried on systemic business in the 1970s and 1980s did not confer general jurisdiction since these activities had been discontinued and plaintiff did not establish that defendant presently conducted business activity in the forum). Thus, Olin and NOR-AM's speculations about prior contacts Fisons may have had with this forum almost 30 years ago are irrelevant.[11] Even if they were relevant, Olin does not even establish that such prior conduct rises to the level of the systematic and continuous contacts required for general jurisdiction. Such actions, that are at best prefatory to true involvement with the forum state, do not independently amount to sufficient contacts for personal jurisdiction over a defendant. Compare Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408, 417 (1984) (contract negotiations, sending personnel for training, and purchasing helicopters, equipment and training

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company's ADRs insufficient contact for general jurisdiction); Williams v. Canon, Inc., 432 F. Supp. 376, 381 (C.D. Cal. 1977)(since sale of ADRs is "not a transaction of business" by defendant and merely conducted by its agent, the sale did not provide a basis of jurisdiction over defendant).

11 Similarly, Olin's reference to a twenty-one year old case in which it claims Fisons was subjected to personal jurisdiction in the United States is meaningless (Olin's Br. at 10).

services in the forum insufficient for general jurisdiction) with Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437, 448 (1952) (president of company maintaining office, distributing checks, using a bank account, and transacting company business in the forum sufficient for general jurisdiction). Olin's assertions, even if taken as true, do not give rise to general jurisdiction. See Donatelli v. National Hockey League, 893 F.2d 459, 471 (1st Cir. 1990) (play-by-play telecasts in forum insufficient contact for general jurisdiction); Sandstrom v. Chemlawn Corp., 904 F.2d 83, 89-90 (1st Cir. 1990) (licensure and appointment of agent for service of process, advertising and litigation activities in forum insufficient for general jurisdiction).

B. Olin Has Failed to Establish Specific Jurisdiction Over Fisons.

For Olin to prove that Fisons' alleged contacts with Massachusetts give rise to specific jurisdiction both under the Massachusetts long-arm statute and the Due Process Clause, it must demonstrate that its cause of action arises from these specific contacts. See Mass. Gen. L. ch. 223A § 3; United Electrical Workers v. 163 Pleasant Street Corp., 960 F.2d 1080, 1089 (1st Cir. 1992) ("Pleasant Street I"). Olin concedes that the constitutional test for specific jurisdiction depends on this "arising from" test, yet proceeds to pay it only lip service, focusing instead on the other factors involved in the constitutional inquiry -- the question of purposeful availment and "gestalt factors." However, these other facts cannot be considered if the cause of action does not first arise from the contacts with the forum. Pleasant Street I, 960 F.2d at 1089 (the identified contacts must be both the "but for" and the "proximate" causes of the claim to sustain specific personal jurisdiction). Because Olin

nowhere proves this threshold requirement, the availment and gestalt prongs are irrelevant.

Olin repeatedly mischaracterizes the caselaw that discusses the nexus required for a cause of action to arise from a contact with the forum. For example, Olin cites United Electrical Radio and Machine Workers of America v. Pleasant Street Corp., 987 F.2d 39, 45 (1st Cir. 1993) ("Pleasant Street II") as supporting jurisdiction over Fisons. Olin fails to mention that both Pleasant Street II and Pleasant Street I agree that plaintiff's ERISA cause of action was based on the collective bargaining agreement negotiated by the defendant in the forum. In contrast, Fisons had nothing to do with the waste disposal that is forming the basis of Olin's action. The only question in the Pleasant Street litigation was the purposeful availment requirement for specific jurisdiction -- a question that is not even reached here.

Olin relies on Ealing Corp. v. Harrods Ltd., 790 F.2d 978, 982-83 (1st Cir. 1986) in arguing that Fisons caused tortious injury in the Commonwealth and thus satisfies section 3(c) of the Massachusetts long-arm statute. In Ealing Corp., plaintiff claimed fraudulent misrepresentation based on express warranties. That claim arose directly out of the contact with the forum -- the sending of a telex that contained the express warranties. Here, without piercing the veil between Fisons and NPI, Olin has not proven and cannot prove direct activity by Fisons that generated waste or resulted in disposal at the site.

Olin cites Hahn v. Vermont Law School, 698 F.2d 48, 51 (1st Cir. 1983) for the proposition that where "the contacts that confer personal jurisdiction over a

defendant are also instrumental in the determination of liability, the claim necessarily 'arises from' the jurisdictional contacts." Hahn involved a breach of contract. The Court determined that the contract was comprised of terms that were in the application information and acceptance letter that defendant purposely sent into the forum. Id. These contacts were not just instrumental in determining defendant's liability -- they were the very basis of that liability. Here, the disposal of waste at the Wilmington site is the analogous factual basis to Olin's claim. Fisons did not engage in that activity.

Olin cites to a single case, State of Idaho v. M.A. Hanna Co., 819 F. Supp. 1464 (D. Idaho 1993), to support its argument that its claims directly arise from or relate to Fisons' Massachusetts activities. Hanna involved pollution from a mine site. The Court found specific jurisdiction over a successor to a parent corporation based upon the parent corporation's activities at the mine prior to its selling the mine to its wholly-owned subsidiary. Olin says this case is analogous to the instant matter because the "parent corporation had staked claims and explored a potential mine site" (Olin's Br. at 17). Olin does not seem to comprehend the grave distinction between exploring a mine and the pre-purchase conduct Fisons is alleged to have engaged in before its subsidiary purchased NPI. The magistrate's decision in Hanna, adopted by the District Court, explains:

> "Although the parties have hotly disputed whether Howe Sound's [the parent corporation] use and possession of the property is relevant given CERCLA's focus on the disposal of waste, the Court is satisfied exploration activities which included diamond drilling resulted in the accumulation of at least some waste rock. The gravamen of plaintiff's claim is that the mine operation caused significant waste rock, tailing and overburden to be accumulated through which ground and surface water drains and is

> contaminated. . . . [T]he Court is satisfied that a substantial connection exists between Howe Sound's exploration activity and plaintiffs' claims."

819 F. Supp. at 1476. Unless Olin can prove how Fisons' "exploration" or other direct contacts with the forum involved disposal of wastes, it cannot claim that jurisdiction is warranted based on any alleged direct contacts with Massachusetts.

Olin does not refute that In re Acushnet River & New Bedford Harbor Proceedings Re Alleged PCB Pollution, 675 F. Supp. 22 (D. Mass. 1987) (Young, J.) governs when personal jurisdiction over a parent corporation can be exercised in a CERCLA and RCRA action. It merely argues that unlike Fisons, the defendant in In re Acushnet River had no minimum contacts with the forum state. However, Fisons activity in purchasing NPI and protecting its investment in a manner consistent with a normal parent-subsidiary relationship, even if it had occurred at the time of the filing of the complaint, does not rise to the level of continuous and systematic contacts required for general jurisdiction and thus its situation is indistinguishable from the defendant in In re Acushnet River.[12]

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12 Olin attempts to argue that Fisons is an owner/operator under United States v. Kayser-Roth Corp., 910 F.2d 24 (1st Cir. 1990), cert. denied, 498 U.S. 1084 (1991) and John S. Boyd Co. v. Boston Gas Co., 992 F.2d 401 (1st Cir. 1993) and is subject to the jurisdiction of the court as a result. First, Olin conveniently does not point out the factors in those cases that clearly demonstrate why Fisons' relationship with NPI does not rise to the level of owner/operator. In Kayser-Roth, the parent exercised total monetary control through collection of accounts payable and placed its personnel in almost all the subsidiary's director and officer positions. 910 F.2d at 27. NPI collected its own accounts payable (Woodhams Supp. Decl. ¶ 3), no Fisons personnel simultaneously served as officers of NPI (id.), and representatives of Fisons at no time constituted a majority of the NPI board of directors (id.). In John S. Boyd, the

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II.
FURTHER DISCOVERY ON THE ISSUE OF PERSONAL JURISDICTION IS NOT WARRANTED

Realizing they have shown too little, both Olin and NOR-AM maintain that it would be an abuse of discretion for the Court to grant Fisons' motion without

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parent controlled the subsidiary's checking account, handled the purchase of its raw material that resulted in the alleged contamination, and maintained the subsidiary's property. 992 F.2d at 408. NPI controlled its own checking account (Woodhams Supp. Decl. ¶ 3), purchased its own raw materials (id.), and maintained its own property (id.). The difference between these cases and Fisons' relationship with NPI thus lies in the involvement -- or in Fisons' case the lack of involvement -- with the day-to-day operations of the companies involved. See also Jacksonville Electric Authority v. Bernuth Corp., 996 F.2d 1107, 1110 (11th Cir. 1993)(parent corporation may be held liable only when it exercises actual and pervasive control of the subsidiary to the extent of actually involving itself in the daily operations of the subsidiary).

Second, CERCLA, RCRA and the Massachusetts Hazardous Waste Act cannot confer jurisdiction over Fisons beyond the Massachusetts long-arm statute or the Due Process Clause. See Motion to Dismiss at 16. Accordingly, John Boyd and Kayser-Roth are not genuinely authoritative on the personal jurisdiction question because they do not involve that inquiry. Rather, In re Acushnet River is the guiding authority. See Motion to Dismiss at 7-9.

Finally, the cases cited by Olin for the proposition that if Fisons is liable as an owner/operator, Olin's claim necessarily "arises from" Fisons' actions and omissions, simply do not stand for that proposition. In Steego Corp. v. Ravenal, 1993 U.S. Dist. LEXIS 10183 (D. Mass. June 28, 1993)(Tauro, J.) the owner of a mill-site sued the former owners and the trustee of the estate of the former owners of the site. The defendant actually owned the property in question so jurisdiction under the Massachusetts long-arm over the foreign trustee was clear: there was no parent-subsidiary issue involved. In State of Idaho v. Bunker Hill Co., 635 F. Supp. 665, 670-71 (D. Idaho 1986) the Court first engaged in a personal jurisdiction analysis and then discussed owner/operator liability. While it found that the analysis with respect to the parent's involvement in the management and operations of the subsidiary was relevant to both questions, it did not hold that a finding of owner/operator liability automatically confers personal jurisdiction over defendant.

conducting further discovery. Both cite the same three cases for this proposition, none of which support an order for discovery in this case. The Court is free to and, in this case, should make a determination whether plaintiff meets its burden of proof on personal jurisdiction based on the motion papers and affidavits before it. See Kowalski v. Doherty, Wallace, Pillsbury and Murphy, 787 F.2d 7, 8 (1st Cir. 1986); Chlebda v. H.E. Fortna and Brother, Inc., 609 F.2d 1022, 1023-24 (1st Cir. 1979). The emphasis of the new Local Rules on avoiding unnecessary and costly discovery warrants requiring Olin to establish that further discovery is necessary before the foreign corporation is required to submit to discovery.

Olin and NOR-AM read Pleasant Street II as requiring discovery on issues of jurisdiction. Discovery was granted in that case because plaintiffs never had a full opportunity to address the court, either orally or on paper or to introduce further evidence. 987 F.2d at 47. Olin and NOR-AM have had a clear opportunity to respond to Olin's motion with affidavits and other evidence. If Olin cannot overcome defendant's proof that jurisdiction cannot be exercised or give a reason why further discovery would overcome this proof, such discovery is not required. Cf. Fed. R. Civ. P. 56(f) ("Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment . . .").[13]

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13 Neither the Riley affidavit nor the lawyer affidavit submitted by NOR-AM comply with Rule 56(e) and thus must be stricken (see Motion to Strike the Declarations of Charles Riley and Kermit L. Rader filed herewith).

In Boit v. Gar-Tec Products, Inc., 967 F.2d 671, 681 (1st Cir. 1992), the Court actually upheld dismissal for lack of jurisdiction without discovery. See also Mylan Laboratories, Inc. v. Akzo, N.V., supra, 1993 WL 293509 at *6, ___ F.3d at ___ (dismissing for lack of personal jurisdiction without allowing further discovery). In Surpitski v. Hughes Keenan Corp., 362 F.2d 254, 255 (1st Cir. 1966) plaintiff had at least "made good headway" in establishing its position. The Court also noted that a plaintiff "who is a total stranger to a corporation" must be diligent in attempting to prove the facts for denial of discovery to be an abuse of discretion. Id.[14] Olin and NOR-AM's diligence on the jurisdictional issue has been questionable. Olin started what amounts to this litigation almost one year ago by filing on October 27, 1992 a "Notice of Claim for Recovery of Cleanup Costs at Wilmington, Massachusetts Facility, Under Federal and State Law" pursuant to Section 4A of Massachusetts General Law Chapter 21E. Since the legislation requires that the claimant "describe with particularity the legal and factual basis for the notifier's claim," Chapter 21E § 4A(a), Olin presumably had developed facts to support its allegation that Fisons was liable under CERCLA as an operator of the Facility at that time. Olin is also is hardly a stranger to NPI or Fisons.[15] Olin clearly has access to individuals who

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14 Furthermore, in Surpitski, the District Court was particularly precipitous in denying a discovery request. Twelve days after jurisdiction was contested, plaintiff received a 48-hour "prove jurisdiction, or else" ultimatum. 362 F.2d at 256. Olin has pursued what amounts to this litigation for over a year now while being in control of at least one key witness and yet has not come forward with sufficient proof of jurisdiction.

15 Unlike the plaintiffs in the cases Olin cites, Olin has already demonstrated that it has possession of a wealth of information concerning Fisons and NPI.

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presumably would know what contacts, if any, Fisons had with the site -- Charles Riley, the plant manager during the years Fisons owned NPI, is an Olin declarant and at least as of 1990 was a Stepan Chemical Company employee, an entity that is cooperating with Olin. Olin had the opportunity to come forward with sufficient jurisdictional facts if they existed, but did not do so. Olin's complete failure to demonstrate jurisdiction up to this point should not be rewarded with further discovery -- if personal jurisdiction over Fisons were provable, Olin would have already done it.

Finally, to the extent that their briefs contain discovery requests, neither Olin nor NOR-AM have complied with the Massachusetts District Court Rule 26.2 requirements for parties initiating discovery. It states:

> "Before any party may initiate discovery, that party must submit to the opposing party a description, including the location, of all documents that are relevant to disputed facts alleged with particularity in the pleadings."

Since the filing of this action neither Olin nor NOR-AM have provided anything, let alone a description in compliance with Local Rule 26.2.

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> Olin's Exhibits attached to its brief included: correspondence dating back thirty years between Fisons and the American Biltrite Company, Inc.; minutes of the Board of Directors meetings of both Fisons Ltd. and Fisons Corporation; correspondence between Whiffen & Sons and its insurance brokers; the 1964 agreement by which Fisons acquired the stock of NPI; discovery from the Charles George Trucking litigation which dealt with the same corporate relationships at issue here; and a Fisons press release.

III.
NOR-AM WILL NOT SUFFER UNDUE HARDSHIP IF FISONS MOTION TO DISMISS IS GRANTED AS IT DOES NOT HAVE A COLORABLE CLAIM OF INDEMNITY

NOR-AM argues jurisdiction over Fisons is required because the gestalt factors require the court to adjudicate NOR-AM's indemnity claim against Fisons. NOR-AM's position is clearly wrong. First, as noted above, because Olin has not satisfied the "arising from" test, gestalt factors are irrelevant. Second, NOR-AM's indemnity claim has no bearing on whether this court has power to assert personal jurisdiction over Fisons. The July 15, 1983 Agreement for the Sale and Purchase of the Issued Share capital of FBC Holdings limited ("the Agreement"), under which NOR-AM asserts indemnity for its potential liability to Olin, was negotiated entirely in Europe and primarily in the United Kingdom and is expressly governed by English law (Bailey Supp. Decl. ¶ 3). NOR-AM was not even a party to the agreement (id.). The agreement in no way provides for Fisons' consent to be sued in the United States (id.). Indeed, NOR-AM recognized the absence of Fisons' amenability to suit in Massachusetts by attempting to serve its Amended Cross-Claims Against Fisons plc by mailing a copy to Fisons' office in Ipswich, England (id.).

Moreover, the Agreement does not require Fisons to indemnify NOR-AM for any liability it may incur arising out of the Wilmington facility. Any liability Fisons had in respect of the Warranties (including indemnification) for acts or omissions prior to December 22, 1980 terminated on the second anniversary of the date of the Agreement -- July 15, 1985. (See Exhibit A (attached to Bailey Supplemental Declaration) at ¶¶ 5.5, 5.19(ii)). Since NOR-AM did not provide Fisons with

notice of an indemnity claim prior to that date (Bailey Supp. Decl. ¶ 4), Fisons cannot be liable under that provision of the Agreement.[16]

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16 The ten-year window for filing notice of a claim in respect of paragraph 32 of the Fourth Schedule of the Agreement (Exhibit A at p. 62-63) is not applicable because NOR-AM's indemnity claim does not fall under the terms of that paragraph. Paragraph 32 governs "failures to treat, deal with, use, store or dispose any raw material, finished product or waste product in the manner required by law" occurring after December 22, 1980 up to the Final Condition Date. Since NOR-AM's liability, as alleged by Olin, stems from activities of its predecessors Fisons Corp. and Fisons Inc. at the Wilmington facility prior to 1973, paragraph 32 does not provide NOR-AM with an indemnity claim against Fisons. Moreover, this indemnity provision does not extend to the liabilities asserted here which are based on strict liability remedial statutes, not alleged violations of any requirements of law in effect at the time of the alleged disposal of wastes at the Wilmington facility.

CONCLUSION

For the foregoing reasons and the reasons set forth in Fisons Memorandum of Law in Support of Its Motion to Dismiss, this court should dismiss plaintiff Olin's complaint with respect to Fisons plc for lack of personal jurisdiction.

Dated: October 4, 1993

Respectfully submitted,

MCDERMOTT, WILL & EMERY

Donald R. Frederico
Susan M. Insoft
75 State Street
Boston, Massachusetts 02109
(617) 345-5000

-and-

Charles A. Gilman
Robert M. Hallman
Patrick L. Rocco
Harry Feder
CAHILL GORDON & REINDEL
(a partnership including a
professional corporation)
80 Pine Street
New York, New York 10005
(212) 701-3000

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT ON THIS ... A TRUE COPY OF THE FOREGOING ... SERVED UPON ALL COUNSEL OF RECORD BY ...

DATE: 10/4/93